

FEB - 4 2008

FEDERAL ELECTION COMMISSION

**999 E Streets, N.W.
Washington, DC 20463**

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5935

DATE COMPLAINT FILED: August 23, 2007

DATE OF NOTIFICATION: August 30, 2007

LAST RESPONSE RECEIVED: October 16, 2007

DATE ACTIVATED: November 6, 2007

EXPIRATION OF SOL: July 21, 2012

COMPLAINANT:

Robert X. Monahan, Chairman
Rhinebeck Republican Party

RESPONDENT:

Representative Kirsten E. Gillibrand

RELEVANT STATUTES:

2 U.S.C. § 441i(e)(1)
11 C.F.R. § 300.62

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns an invitation to a July 21, 2007 reception hosted by supporters of Dutchess County (New York) Executive candidate Joseph Ruggiero.¹ The invitation invites recipients "to attend a reception in support of Wappinger Supervisor Joseph Ruggiero and Candidate for Dutchess County Executive with special guests Congresswoman Kirsten

¹ Ruggiero lost in the November 6, 2007 general election to the incumbent, William Steinhaus.

1 Gillibrand and Assemblymember Kevin Cahill.” *See* Attachment 1. The lower half of the
2 invitation provides the following contribution amounts for recipients to check off: \$2,500
3 (Chair); \$1,000 (Host); \$500 (Sponsor); and \$150 (Individual ticket).² The invitation also states
4 that Sponsors, Hosts and Chairs were eligible to participate in a “VIP” reception with
5 Representative Gillibrand and Assemblymember Kevin Cahill. *Id.*

6 The complainant asserts that Gillibrand violated the soft money prohibitions of the
7 Federal Election Campaign Act of 1971, as amended, (“the Act”) by permitting her name to
8 appear on the subject invitation, which asked for contributions up to \$2,500 and did not contain
9 any language prohibiting corporate contributions. *See* 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R.
10 § 300.62. The response contends that the facts do not support a finding that Gillibrand violated
11 the Bipartisan Campaign Reform Act of 2002’s (“BCRA”) ban on the solicitation of non-Federal
12 funds because the invitation in question was sent without her personal knowledge and all the
13 contributions raised by the event came from Federally permissible sources in amounts less than

² Under New York State law, individuals, corporations, political committees, unincorporated unions and trade organizations, and any other entities such as Leagues and associations may contribute to candidates and committees. Limited liability companies are treated as individuals for contribution purposes. *See* New York State Board of Elections, <http://www.state.ny.us> (last visited Jan. 15, 2008). According to the Dutchess County Clerk’s office, individual contributors to candidates running for County Executive were entitled to contribute \$7,881.50 to each candidate in the general election.

1 \$2,300.³ According to the response, Gillibrand's campaign employs individuals whose
2 responsibilities include responding to requests for political support in the district. The response
3 asserts that these employees are not permitted to solicit or direct "soft money." Response at 2.
4 Further, Ross Offinger, the campaign staffer who reviewed the invitation and approved its
5 distribution on behalf of Representative Gillibrand, states in his affidavit that he was unfamiliar
6 with the relevant Advisory Opinions and thought that the draft invitation was appropriate
7 because the highest amount solicited (\$2,500) did not exceed the \$4,600 the representative was
8 entitled to solicit for her own primary and general elections combined.⁴ See Offinger Aff.
9 ¶¶ 1 and 3.

10 As discussed more fully below, a Federal officeholder may not consent to appear in a
11 solicitation that is not expressly and entirely limited to amounts and sources that comply with the
12 Act's contribution limits and source prohibitions. In this matter, Representative Gillibrand,
13 through her agent, authorized the issuance of a solicitation that specifically requested
14 contributions in excess of Federal limits and failed to expressly bar contributions from prohibited

³ It is an open question as to whether Federally impermissible funds were raised for the Friends of Joseph Ruggiero (the "Ruggiero committee") as a result of the subject solicitation. It appears that the Ruggiero committee may have received one individual contribution of \$2,500 and a \$500 contribution from a limited liability company. The respondent contends that the \$2,500 contribution was not "raised by the event," but was raised by a member of the Host Committee at around the same time as the event. Response at 2 n.1. However, the response does not explain why the individual contributor is identified in the RSVP list as attending the event or why his contribution check is made out for the exact amount specified in the solicitation. According to the response, the Ruggiero committee does not know whether the \$500 check from Medical Answering Services, LLC "was corporate." *Id.* A search of the publicly available information yielded no information as to whether Medical Answering Services, LLC files with the IRS under a single member's name, as a partnership or as a corporation. See 11 C.F.R. § 110.1(g). The category under which the Ruggiero committee chose to report this contribution to the New York State Board of Elections, however, suggests that the \$500 contribution may have come from corporate funds. Instead of reporting this contribution in its 2007 32 Day Pre-General Disclosure Report as an individual or partnership contribution under Filing Schedule A (Monetary Contributions/Individual & Partnership), the Ruggiero committee reported the \$500 under Filing Schedule C (Other Monetary) where it appears to have reported all contributions received from corporations, unions and political committees. A review of New York State Board of Elections database indicates that the Ruggiero committee did not file any of its corporate contributions under Filing Schedule B (Monetary Contributions/Corporate).

⁴ Ruggiero did not have an opponent in the September 18, 2007 primary election.

sources, including corporations, labor unions, foreign nationals and government contractors. Therefore, this Office recommends that the Commission find reason to believe that Representative Gillibrand violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62, authorize pre-probable cause conciliation and approve the attached conciliation agreement.

II. DISCUSSION

A. **The Fundraising Invitation Constituted a Solicitation by the Respondent For Funds Exceeding the Act's Contribution Limits and Source Prohibitions**

Under BCRA, Federal officeholders, candidates for Federal office, agents of Federal officeholders, and agents of candidates for Federal office may not solicit, receive, direct, transfer or spend funds in connection with either Federal or non-Federal elections, unless the funds comply with Federal contribution limits and source restrictions.⁵ 2 U.S.C. § 441i(c)(1)(A) and (B); 11 C.F.R. §§ 300.61 and 300.62. Specifically, Federal officeholders, candidates, and their agents, may not raise funds in connection with Federal or non-Federal elections that exceed the current limit of \$2,300 per election per candidate or come from corporations, labor organizations, federal contractors or foreign nationals.⁶ The Commission defines the term "solicit" as "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution,

⁵ No persons can make contributions to any Federal candidate or that candidate's authorized political committee that exceeds \$2,300 per election. 2 U.S.C. § 441a(a)(1)(A). Corporations, labor unions, federal government contractors and foreign nationals are prohibited from making contributions. 2 U.S.C. §§ 441b(a), 441c(a)(1) and 441e(a).

⁶ A Federal officeholder or candidate for Federal office may, however, attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, without restriction or regulation. 2 U.S.C. § 441i(c)(3); 11 C.F.R. § 300.64. In the Explanation and Justification for 11 C.F.R. § 300.64, the Commission noted that the rule "is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves ... the regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event. Unlike oral remarks that a Federal candidate or officeholder may deliver at a State party fundraising event, when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. § 441i(e)(1)." 70 Fed. Reg. 37,649, 37,653 (June 30, 2005).

1 donation, transfer of funds, or otherwise provide anything of value." 11 C.F.R. § 300.2(m).⁷

2 The Commission's regulations describe a solicitation as "providing a separate...reply device that
3 contains an address to which funds may be sent and allows contributors or donors to indicate the
4 dollar amount of their contribution or donation to the...political committee." 11 C.F.R.
5 § 300.2(m)(1)(i).

6 The Commission has interpreted this restriction on the solicitation of funds in the context
7 of particular facts presented in several Advisory Opinions regarding Federal candidates' and
8 officeholders' participation in fundraising events where donations outside of Federal contribution
9 limits and source restrictions were sought. See AO 2003-03 (*Cantor*), AO 2003-36 (*Republican*
10 *Governors Association ("RGA")*); see also AO 2003-37 (*Americans for a Better Country*
11 (*"ABC"*)) (superseded by 11 C.F.R. § 106.6 on Nov. 23, 2004).

12 The facts addressed in the *Cantor* Advisory Opinion relate to the appearance of Federal
13 candidates and officeholders in publicity preceding an event at which funds would be raised for
14 state candidates. Specifically, the requestors noted that

15 [t]hey would like Representative Cantor to: (1) attend campaign events, including
16 fundraisers, (2) solicit financial support, and (3) do so orally or in writing.
17 Congressman Cantor would like to participate in their campaigns in this manner.
18 Requestors ask for guidance from the Commission about the degree to which
19 Representative Cantor, as a Federal officeholder and candidate, may engage in
20 State and local election activities.
21

⁷ The Commission adopted this definition of "solicit" on March 20, 2006 (effective April 19, 2006), in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied* (Oct. 21, 2005). The Commission specifically declined to make changes to the principles set forth in the Advisory Opinions that are applicable here or to initiate a rulemaking to address the issues based on testimony that the principles articulated in these Advisory Opinions are well understood and that "the community is complying with them." See 71 Fed. Reg. 13,926, at 13,930-31 (Mar. 20, 2006).

1 In response to the specific question asking whether the Congressman's attendance at the event
2 may be publicized and whether he may participate in the event as a featured guest, the
3 Commission responded:

4 Section 441i(e)(1) and section 300.62 do not apply to publicity for an
5 event where that publicity does not constitute a solicitation or direction of non-
6 Federal funds by a covered person, nor to a Federal candidate or officeholder
7 merely because he or she is a featured guest at a non-Federal fundraiser.

8 In the case of publicity, the analysis is two-fold: First, whether the
9 publicity for the event constitutes a solicitation for donations in amounts
10 exceeding the Act's limitations or from sources prohibited from contributing
11 under the Act; and second, whether the covered person approved, authorized, or
12 agreed or consented to be featured or named in, the publicity. If the covered
13 person has approved, authorized, or agreed or consented to the use of his or her
14 name or likeness in publicity, and that publicity contains a solicitation for
15 donations, there must be an express statement in that publicity to limit the
16 solicitation to funds that comply with the amount limitations and source
17 prohibitions of the Act.

18 AO 2003-03 (Response to Question 3.c) (citations omitted).

19 The Commission revisited the issue of covered persons' participation as featured guests in the

20 RGA Advisory Opinion. The specific question there was:

21 1.b. May a covered individual participate [as a featured guest at an RGA
22 fundraising event] by having his name appear on written solicitations for an RGA
23 fundraising event as the featured guest or speaker?

24
25 After restating the two-step analysis from the *Cantor* Advisory Opinion, the Commission
26 answered:

27 A Federal candidate may not solicit funds in excess of the amount limitation or in
28 violation of the source prohibitions of the Act. If the covered individual
29 approves, authorizes, or agrees or consents to be named or featured in a
30 solicitation, the solicitation must contain a clear and conspicuous express
31 statement that it is limited to funds that comply with the amount limits and source
32 prohibitions of the Act.

33 AO 2003-36 (Response to Question 1.b).

1 Thus, if a Federal officeholder, a Federal candidate or an agent of the Federal
2 officeholder or candidate approves, authorizes, or agrees or consents to be named or featured in a
3 solicitation, then the entire solicitation must be limited to Federally permissible funds. The
4 Commission further explained this restriction in *RGA*, stating that a disclaimer will not inoculate
5 a covered person who approves his or her appearance in a solicitation that explicitly seeks funds
6 beyond the limits and prohibitions of the Act. AO 2003-36, at n.9.

7 Subsequently, the Commission again considered the involvement of Federal officeholders
8 or candidates in fundraising for non-Federal elections in the *ABC* Advisory Opinion. In *ABC*,
9 which primarily addressed the allocation of expenses by nonconnected committees and was
10 superseded when the Commission enacted new regulations regarding the allocation of certain
11 expenses (*see* 69 Fed. Reg. 68,056, 68,063 (Nov. 23, 2004)), the requestor asked if Federal
12 officeholders or candidates could be named as "honored guests" or "featured speakers" at
13 fundraising events for ABC's non-Federal account. The Commission, citing to both the *Cantor*
14 and *RGA* Advisory Opinions, stated:

15 [A] candidate's consent or agreement to be mentioned in an invitation as an
16 honored guest, featured speaker or host, where that invitation is a solicitation,
17 constitutes a solicitation by the candidate. Thus, if a candidate agrees or consents
18 to be named in a fundraising solicitation as an honored guest, featured speaker or
19 host, or if the invitation constitutes a solicitation for any other reason, then the
20 solicitation must contain a clear and conspicuous statement that the *entire*
21 *solicitation* is limited to funds that comply with the amount limits and source
22 prohibitions of the Act.

23
24 AO 2003-37, at 18 (emphasis added).⁸

25 Most recently, the Commission addressed the participation of a Federal officeholder in

⁸ Although AO 2003-37 (*ABC*) was superseded by new regulations addressing certain allocation rules, we believe the analysis as it pertains to Federal officeholder or candidate involvement in fundraising for non-Federal elections is sound.

1 fundraising events for state and other non-Federal candidates in MURs 5712 and 5799 (McCain).
2 In those matters, the Commission, consistent with the guidance provided in the above-referenced
3 Advisory Opinions, determined that when a Federal officeholder or his agent agrees to that
4 officeholder's appearance in a written solicitation for contributions in connection with the
5 election of a non-Federal candidate, the entire solicitation must be expressly and entirely limited
6 to amounts and from sources that comply with the contribution limits and source prohibitions.
7 See MURs 5712 and 5799 (McCain).

8 In summary, to comply with the soft money prohibitions of BCRA, Federal officeholders
9 and candidates, and their agents, must adhere to the following requirements if and when they, or
10 their agents, approve, authorize, agree or consent to appear in a written solicitation in connection
11 with the election of non-Federal candidates:

- 12 1. A Federal officeholder or candidate may appear in written
13 solicitations in connection with the election of non-
14 Federal candidates, so long as the solicitation is expressly
15 and entirely limited to amounts and from sources that
16 comply with the Act's contribution limits and source
17 prohibitions.
18
- 19 2. If a written solicitation in connection with the election of
20 non-Federal candidates asks for donations, but does not
21 specify an amount, a Federal officeholder or candidate
22 may appear in the written solicitation provided it
23 contains express language stating that the Federal
24 officeholder or candidate is only soliciting amounts that
25 comply with the Act's contribution limits and source
26 prohibitions.
27
- 28 3. However, if a written solicitation in connection with the
29 election of non-Federal candidates explicitly asks for
30 donations of funds in amounts exceeding the Act's
31 contribution limits or from prohibited sources, then a
32 Federal officeholder or candidate may not appear in the
33 solicitation regardless of whether there is an express
34 statement limiting the Federal officeholder or candidate's

solicitation to funds that comply with the amount limits
and source prohibitions of the Act.

The solicitation to the Ruggiero reception sought donations in specific amounts of \$2,500
(Chair level), \$1,000 (Host level), \$500 (Sponsor level), and \$150 (Individual ticket). *See*
Attachment 1. The amount requested from recipients seeking to become a Chair level donor
exceeded the Federal contribution limits for individuals per election per candidate. 2 U.S.C.
§ 441a(a). Further, the solicitation did not contain any language stating that the entire
solicitation was limited to contributions from Federally permissible sources. 2 U.S.C.
 §§ 441b(a), 441c(a)(1) and 441e(a). Thus, the solicitation to the July 21, 2007 Ruggiero
fundraiser was not limited to Federally permissible funds.

Given that the solicitation at issue in this matter, which Representative Gillibrand
consented to through her agent, was not expressly and entirely limited to amounts and sources
that complied with the Act, this Office recommends that the Commission find reason to believe
that Representative Kirsten Gillibrand violated 2 U.S.C. § 441e(e) and 11 C.F.R. § 300.62,
authorize pre-probable conciliation and approve the attached conciliation agreement.

**B. Representative Gillibrand Appeared, Authorized, Agreed or Consented to
Appear in the Solicitation Through Her Agent**

Gillibrand's response suggests that she cannot be held personally liable for the actions of
her campaign's Finance Director, Ross Offinger, in approving the appearance of her name on the
solicitation at issue. Response at 4. However, Gillibrand can be held liable for Offinger's
actions because she authorized Offinger to act as her agent with respect to her participation in
political events held in her congressional district, including the July 21, 2007 fundraiser for
Dutchess County Executive candidate Ruggiero.

For purposes of the Commission's BCRA regulations, an agent is defined as "any person

1 who has actual authority, either express or implied,...to solicit, receive, direct, transfer, or spend
2 funds in connection with an election" on behalf of a candidate for Federal office. 11 C.F.R.
3 § 300.2(b). It is therefore unnecessary for a principal to have explicitly told his or her agent to
4 perform a particular function on his or her behalf. Rather, actual authority may be established in
5 many different ways. See Definition of "Agent" for BCRA Regulations, 71 Fed. Reg. 4975,
6 4978 (Jan. 31, 2006).

7 Apparent authority is not necessary to capture impermissible activities by persons
8 holding certain titles or positions within a campaign organization, political party
9 committee, or other political committee. A title or position is most frequently part of the
10 grant of actual authority, either express or implied. *Id.*

11
12 The Commission stated that because a title or position creates an implied scope of
13 authority, the Federal officeholder or candidate could be found liable for his or her agent's
14 actions, provided they are within the scope of authority, even if the Federal officeholder or
15 candidate instructed the agent not to perform the task. See *id.* In addition, "[a]cquiescence by
16 the principal in conduct of an agent whose previously conferred authorization reasonably might
17 include it, indicates that the conduct was authorized..." *Id.* at 4979 (quoting Restatement
18 (Agency) § 43).

19 The available information indicates that Offinger, who was employed as the Gillibrand
20 campaign's Finance Director, had actual authority to approve the use of Representative
21 Gillibrand's name in solicitations for fundraising events. Offinger Aff. ¶ 1. The response admits
22 that Gillibrand's campaign employs individuals, such as Offinger, whose duties include
23 responding to requests for political support in her district. Response at 2. According to
24 Offinger's affidavit, he responds to these types of requests from "time to time" and reviewed and
25 approved the Ruggiero committee's request that Gillibrand participate in the July 21, 2007
26 fundraising event. Offinger Aff. ¶¶ 1-3. Offinger states that he was contacted by the Ruggiero

1 campaign in the summer of 2007 regarding whether Representative Gillibrand could attend the
2 July 21st fundraising reception to support Ruggiero's candidacy and whether her name could be
3 included on the event invitation. Offinger Aff. ¶¶ 2 and 3. After checking Gillibrand's schedule
4 and reviewing a draft version of the invitation, Offinger confirmed the Congresswoman's
5 attendance at the event and approved the appearance of her name on the subject invitation.⁹ *Id.*

6 By authorizing Offinger to respond to requests for political support in the district, such as
7 the July 21, 2007 reception for candidate Ruggiero, Gillibrand permitted him to act as her agent
8 in performing whatever tasks were required to arrange for her appearance at such events,
9 including reviewing and approving invitations to those events. 71 Fed. Reg. 4975, 4978-79;
10 Restatement (Agency) § 43. It was not necessary for Gillibrand to have seen the subject
11 invitation or for her to have explicitly authorized Offinger to perform the specific tasks
12 associated with responding to the Ruggiero committee's request on her behalf. *Id.* By
13 authorizing Offinger to respond to requests, like that made by the Ruggiero committee,
14 Gillibrand implicitly authorized him to perform whatever tasks were necessary to enable her
15 participation and appearance at such political events, which tasks would include the review and
16 approval of invitations.

17 **III. CONCILIATION AND CIVIL PENALTY**

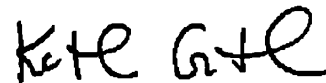
18 We believe that an investigation is unnecessary and, therefore, recommend that the
19 Commission enter into pre-probable cause conciliation with Representative Gillibrand and
20 approve the attached conciliation agreement. _____
21 _____

⁹ According to Offinger, the draft invitation he approved was substantially the same as the copy of the invitation attached to the complaint. Offinger Aff. ¶ 3.


IV. **RECOMMENDATIONS**

1. Find reason to believe that Representative Kirsten Gillibrand violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62;
2. Enter into pre-probable cause conciliation with Representative Kirsten Gillibrand;
3. Approve the attached conciliation agreement;
4. Approve the attached Factual and Legal Analysis; and
5. Approve the appropriate letter.

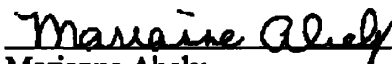
Thomasenia P. Duncan
General Counsel



BY: Kathleen M. Guith
Acting Associate General Counsel



Thomas J. Andersen
Acting Assistant General Counsel



Marianne Abely
Attorney

Date

2-1-08

MUR 5935
Representative Kirsten Gillibrand
First General Counsel's Report

Attachments:

1. Invitation to July 21, 2007 Ruggiero Fundraising Event

Monique Segarra & Christopher Lipscomb, Warren Smith & Ron VanVoorhies,
Carolyn Marks Blackwood, Clare Brandt, Linda Faber, Stewart Kahn, Bruce Kraus,
Kathy Hammer, Chris Del Giudice, Bill Jeffway, Michael Del Giudice and Jayne Keyes
(Committee in formation)

Cordially invite you
to attend a reception in support of

Wappinger Supervisor
Joseph Ruggiero
and Candidate for Dutchess County Executive

With special guests
Congresswoman Kirsten Gillibrand
&
Assemblymember Kevin Cahill

Saturday July 21st
3:30-5pm

At Mansakenning, the home of
Monique Segarra and Christopher Lipscomb
70 Mansakenning Drive (off Ackert Hook Road)
Rhinebeck, NY

Please RSVP to dbelau@earthlink.net
by July 13th
Space is limited

_____ Chair \$2500

_____ Host \$1000

_____ Sponsor \$500

_____ Individual Ticket \$150

(There will be a VIP reception for Sponsors, Hosts and Chairs with Rep. Gillibrand, Assemblyman Cahill & Joseph Ruggiero)

Donations maybe contributed via credit card on-line at www.ioeruggiero.org

Or by sending a check to:
Friends of Joseph Ruggiero
PO Box 294
Wappingers Falls, NY 12590